IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

IN THE MATTER OF THE PROPOSED AMENDMENT OF SDCL 15-6-45(b) AMENDMENT OF SDCL 15-26A-75 AMENDMENT OF SDCL 19-19-502 A PROPOSED COURT RULE CONCERNING THE CARRYING OF A CONCEALED PISTOL IN THE STATE CAPITOL AREAS UNDER THE AUTHORITY OF THE SUPREME COURT.	)	**NOTICE OF SPECIAL RULES HEARING** **NO. 140**

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Petitions for amendments of existing sections of the South Dakota Codified Laws and a proposed adoption of new rule having been filed with the Court and the Court having determined that the proposed amendments and proposed adoption of a new rule should be noticed for hearing, now therefore,

NOTICE IS HEREBY GIVEN THAT ON AUGUST 26, 2019, at 10:00 A.M., C.T., at the Courtroom of the Supreme Court in the Capitol Building, Pierre, South Dakota, the Court will consider the following:

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1. Proposed Amendment of SDCL 15-6-45(b). Subpoena for production of documentary evidence. A subpoena may ~~also~~ command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein, regardless of whether the attorney also notices the person's deposition; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may:

(1) Quash or modify the subpoena if it is unreasonable and oppressive; or

(2) Condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

Explanation for Proposal

In 1991, Federal Rule of Civil Procedure 45(a)(1) was amended to allow "the issuance of a subpoena to compel a non-party to produce evidence independent of any deposition. This revision spares the necessity of a deposition of the custodian of evidentiary material required to be produced." Advisory Committee Notes to 1991 Amendment of Rule 45(a) (the paragraph that begins "Fourth").

This amendment has proven useful in federal practice. It reduces the cost of obtaining records from a non-party because a deposition is not required. It is consistent with the goal of South Dakota's Rules of Civil Procedure "to secure the just, *speedy* and *inexpensive* determination of every action." Rule 1 (emphasis added). The reason for the proposed change is to increase the efficiency and reduce the cost of obtaining discoverable documents from a third party.

The change is based on F.R.Civ.P 45(a)(1)(A)(iii). The change is different in form from F.R.Civ.P. 5(a)(1)(A)(iii) because the 1991 federal changes to Rule 45 substantially revised Rule 45. The proposed change to South Dakota Rule of Civil Procedure 45 can be made without making any other changes to it, and without bothering with the other 1991 changes to F.R.Civ.P. 45. The right of a subpoenaed party to obtain relief from an unreasonable or oppressive subpoena is preserved in South Dakota's existing Rule 45.

The proposed change would bring state practice in line with federal practice.

The change would allow an attorney to subpoena a non-party to produce evidence without a deposition. Current law requires a deposition.

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2. Proposed Amendment of SDCL 15-26A-75. Time for serving and filing briefs. (1) **Appellant's brief.** If a transcript is obtained prior to appeal, or if no transcript is ordered, the appellant's brief shall be due within forty-five days after service of the notice of appeal. If a transcript is ordered but not received prior to appeal, or if procedures pursuant to § 15-26A-54 or 15-26A-55 are followed, the appellant's brief shall be due within forty-five days after service of the transcript or filing of the statements provided for in § 15-26A-54 or 15-26A-55.

(2) **Appellee's brief.** The appellee's brief shall be due for service and filing within forty-five days after service of the appellant's brief, or in the case of multiple appellants, within forty-five days after service of the last appellant's brief.

(3) **Appellant's reply brief.** The appellant's reply brief shall be due for service and filing within ~~fifteen~~ thirty days after service of the appellee's brief, or in the case of multiple appellees, within ~~fifteen~~ thirty days after service of the last appellee's brief.

In any appeal from a judgment or order in an adoption or an abuse and neglect proceeding, including a judgment or order terminating parental rights, all time periods under subdivisions (1) and (2) of this section shall be reduced to twenty-five days.

Explanation for Proposal

A reply brief would be due thirty, not fifteen, days after service of the appellee's brief, or the last appellee's brief.

The reason for the change is to improve the quality of justice by improving the quality of reply briefs. A good reply brief requires deep thought and analysis of the appellee's brief; careful legal research to determine the weak points in the appellee's brief to explore issues that have not been previously researched; careful first drafting of the reply brief, making sure not to repeat the opening brief, and to be fully responsive to appellee's brief, while at the same time being as concise as possible; reviewing the first draft and making substantive changes, additions, and deletions needed; completing additional legal research that on second thought is needed; reviewing, revising, and editing the brief at least once (preferably more), as suggested by Justice Brandeis' dictum that "there is no great writing, only great rewriting" (https://www.goodreads.com/quotes/6772530-there-is-no-great-writing-only-great-rewriting) (last visited March 27, 2019); making final changes in the brief to produce the best possible finished product; stepping back from the finished product and saying to oneself "what's wrong with this, and how can I improve it?"; making

In a large law firm where a senior partner has junior partners or associates who can be assigned to do this work, perhaps fifteen days is a reasonable amount of time for all this to occur.

Never having worked in a large law firm, I don't know. But for a small firm or sole practitioner, who are most of the lawyers in South Dakota, fifteen days is too few.

I have spent my career as a sole practitioner or in a small firm. Between the South Dakota Supreme Court and federal appellate courts (mainly the Eighth Circuit), I estimate I've written 50 to 60 reply briefs. It is always a struggle to comply with this Court's fifteen-day time limit. The other demands of practice (depositions, motions, telephone calls, e-mail, office administration, client conferences, other briefs, etc.) don't stop, and limit my ability to set aside the blocks of time needed to prepare the best possible reply brief. Some of these demands can be postponed; others can't be.

Perhaps 20 years ago, I heard Justice John Konenkamp give the Pennington County Bar suggestions about practicing in the Supreme Court. He told us always to file a reply brief. He said that his reaction to an initial brief was often "Sounds pretty good," and his reaction to a response brief was often "Sounds pretty good." He said he then looked to the reply brief.

A good lawyer writes the best reply brief possible. The ultimate winner is this Court, and its administration of justice, which benefits from high-quality legal work. Extending the time limit for a reply brief to thirty days would make it much easier for a lawyer to provide this Court with high-quality legal work.

Federal Rule of Appellate Procedure 31(a)(1) provides a twenty-one day time limit for a reply brief, and provides that a reply brief must be filed at least seven days before argument. I have never had a case in which the "seven days before argument" provision applied, because federal courts of appeal do not ordinarily set oral argument so close to the due date for the reply brief.

United States Supreme Court Rule 25.3 provides thirty days for filing a reply brief.

The change would extend the time for filing a reply brief from fifteen to thirty days.

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3. Proposed Amendment of SDCL 19-19-502. Lawyer-client privilege. (a) Definitions. As used in this section:

(1) A "client" is a person, a fiduciary of a trust or estate, public officer, or corporation, limited liability company, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him;

(2) A representative of the client is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client;

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation;

(4) A "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal services;

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(1) Between himself or his representative and his lawyer or his lawyer's representative;

(2) Between his lawyer and the lawyer's representative;

(3) By him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(4) Between representatives of the client or between the client and a representative of the client; or

(5) Among lawyers and their representatives representing the same client.

(c) Who may claim privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions. There is no privilege under this section:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) Documents attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) Joint clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

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4. Proposed adoption of a court rule concerning the carrying of a concealed pistol in the state capitol areas under the authority of the Supreme Court.

Section 1. That a new rule be added to SDCL Ch. 22-14 as follows:

For purposes of SDCL 22-14-24(5), the Supreme Court chamber in the state capitol building shall include the courtroom, the offices of the justices, the clerk of courts office, law library and the non-public areas of the Supreme Court's administrative and legal staff offices. The public area of the state court administrator's office is not included as part of the Supreme Court chamber.

Section 2. No firearms are permitted in any of the areas included in the Supreme Court chamber as defined in Section 1.

Section 3. Public notice of these provisions shall be posted conspicuously at each public entrance to an area included in the Supreme Court chamber as defined in Section 1.

Section 4. The Chief Justice may waive the application of this rule upon petition of an interested person for good cause shown.

Section 5. This rule is adopted pursuant to SDCL 22-14-25 and shall be effective immediately.

Explanation for Proposal

This rule is proposed in response to the legislative changes made during the 2019 session in SB 115 authorizing certain persons to carry concealed pistols in the state capitol building. The rule defines "chamber" of the Supreme Court to include the courtroom, justice's offices, clerk of courts office, law library and those non-public administrative areas where the justices work and confer with their staff. The restriction does not apply to the public office of the state court administrator for those that comply with the provisions of SDCL 22-14-24(5). The intent is to clarify that the only area under the authority of the Supreme Court in the state capitol building where a member of the public may carry a concealed pistol under the new provisions is the office of the state court administrator.

22-14-24. Exceptions to penalty for possession in a county courthouse or state capitol. The provisions of § 22-14-23 do not apply to:

(1) The lawful performance of official duties by an officer, agent, or employee of the United States, the state, political subdivision thereof, or a municipality, who is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of law or who is an officer of the court;

(2) The possession of a firearm or other dangerous weapon by a judge or magistrate;

(3) The possession of a firearm or other dangerous weapon by a federal or state official or by a member of the armed services, if such possession is authorized by law;

(4) The possession of a concealed pistol in the state capitol by a qualified law enforcement officer or a qualified retired law enforcement officer in accordance with the Law Enforcement Officers Safety Act of 2004, 18 U.S.C. § 926B-C;

(5) The possession of a concealed pistol anywhere in the state capitol, other than in the Supreme Court chamber or other access-controlled private office under the supervision of security personnel, by any person not otherwise referenced in this section, provided:

(a) The person possessing the concealed pistol holds an enhanced permit issued in accordance with § 23-7-53;

(b) At least twenty-four hours prior to initially entering the state capitol with a concealed pistol, the person notifies the superintendent of the Division of Highway Patrol, orally or in writing, that the person intends to possess a concealed pistol in the state capitol;

(c) The notification required by this subdivision includes the date on which or the range of dates during which the person intends to possess a concealed pistol in the state capitol, provided the range of dates may not exceed thirty consecutive days; and

(d) The notification required by the subdivision may be renewed, as necessary and without limit; and

(6) The lawful carrying of a firearm or other dangerous weapon in a county courthouse incident to a hunter safety or a gun safety course or for any other lawful purposes.

Any person interested may appear at the hearing and be heard, provided that all objections or proposed amendments shall be reduced to writing and the original and ten copies thereof filed with the Clerk of the Supreme Court no later than August 14, 2019.

Subsequent to the hearing, the Court may reject or adopt the proposed amendments or adoption or any rule germane to the subject thereof.

Notice of this hearing shall be made to the members of the State Bar by electronic mail notification, by posting notice at the Unified Judicial System's website at http://www.ujs.sd.gov/ or the State Bar of South Dakota's website at http://www.sdbar.org/.

DATED at Pierre, South Dakota this 25th day of July, 2019.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

JUL 25 2019

Clerk

#1 + #2

JAMES D. LEACH

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Rapid City, SD 57702-3483
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jim@southdakotajustice.com

Legal Assistant
Raquel L. Hughes, CLA

Legal Secretary
Verma J. Stehly

March 27, 2019

Clerks Office
South Dakota Supreme Court
500 E Capitol Ave
Pierre, SD 57501

Re: Two Proposed Rule Amendments

Greetings:

Enclosed are two Proposed Rule Amendments for the August Rules Hearing.

If you would like electronic copies of these documents, just let me know. As always, thank you very much.

Very truly yours,

James D. Leach

JDL/vjs
Enclosures

#1

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

PROPOSED RULE AMENDMENT RE:
ALLOWING SUBPOENA OF DOCUMENTS WITHOUT A DEPOSITION

The proposed amendment would make South Dakota Rule of Civil Procedure 45 consistent with the 1991 change to Federal Rule of Civil Procedure 45 by allowing an attorney to issue a subpoena to a non-party to produce evidence without a deposition.

The proposed amendment is:

15-6-45(b)

A subpoena may ~~also~~ command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein, regardless of whether the attorney also notices the person's deposition; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may:

(1) Quash or modify the subpoena if it is unreasonable or oppressive; or

(2) Condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

The information required by SDCL 16-3-5.1 is:

(1) The identity of the proponent of the change is James D. Leach.

(2) A detailed explanation of the change and the reasons for the change.

In 1991, Federal Rule of Civil Procedure 45(a)(1) was amended to allow "the issuance of a subpoena to compel a non-party to produce evidence independent of any deposition. This revision spares the necessity of a deposition of the custodian of evidentiary material required to be produced." Advisory Committee Notes to 1991 Amendment of Rule 45(a) (the paragraph that begins "Fourth").

This amendment has proven useful in federal practice. It reduces the cost of obtaining records from a non-party because a deposition is not required. It is consistent with the goal of South Dakota's Rules of Civil Procedure "to secure the just, *speedy* and *inexpensive* determination of every action." Rule 1 (emphasis added).

The reason for the proposed change is to increase the efficiency and reduce the cost of obtaining discoverable documents from a third party.

(3) An analysis of the state or federal rule or statute that the change is based upon, if any.

The change is based on F.R.Civ.P 45(a)(1)(A)(iii). The change is different in form from F.R.Civ.P. 45(a)(1)(A)(iii) because the 1991 federal changes to Rule 45 substantially revised Rule 45. The proposed change to South Dakota Rule of Civil Procedure 45 can be made without making any other changes to it, and without bothering with the other 1991 changes to F.R.Civ.P. 45. The right of a subpoenaed party to obtain relief from an unreasonable or oppressive subpoena is preserved in South Dakota's existing Rule 45.

(4) A comparison of the change with federal rules or local federal rules on the same subject, if any, and an explanation of any differences, if any.

The proposed change would bring state practice in line with federal practice.

(5) An analysis of how the change affects existing rules or statutes.

The change would allow an attorney to subpoena a non-party to produce evidence without a deposition. Current law requires a deposition.

Dated: March 27, 2019

Respectfully submitted,

James D. Leach
Attorney at Law
1617 Sheridan Lake Rd.
Rapid City, SD 57702
(605) 341-4400
jim@southdakotajustice.com

#2

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

PROPOSED RULE AMENDMENT RE:
TIME FOR FILING A REPLY BRIEF IN THIS COURT

The proposed amendment would change the time for filing a Supreme Court reply brief from fifteen to thirty days.

The proposed amendment is:

15-26A-75

(3) Appellant's reply brief. The appellant's reply brief shall be due for service and filing within ~~fifteen~~ thirty days after service of the appellee's brief, or in the case of multiple appellees, within ~~fifteen~~ thirty days after service of the last appellee's brief.

The information required by SDCL 16-3-5.1 is:

(1) The identity of the proponent of the change is James D. Leach.

(2) A detailed explanation of the change and the reasons for the change.

A reply brief would be due thirty, not fifteen, days after service of the appellee's brief, or the last appellee's brief.

The reason for the change is to improve the quality of justice by improving the quality of reply briefs. A good reply brief requires deep thought and analysis of the appellee's brief; careful legal research to determine the weak points in the appellee's brief to explore issues that have not been previously researched; careful first drafting of the reply brief, making sure not to repeat the opening brief, and to be fully responsive to appellee's brief, while at the same time being as concise as possible; reviewing the first draft and making substantive changes, additions, and deletions needed; completing additional legal research that on second thought is needed; reviewing, revising, and editing the brief at least once (preferably more), as suggested by Justice Brandeis' dictum that "there is no great writing, only great rewriting" (https://www.goodreads.com/quotes/6772530-there-is-no-great-writing-only-great-rewriting) (last visited March 27, 2019); making final changes in the brief to produce the best possible finished product; stepping back from the finished product and saying to oneself "what's wrong with this, and how can I improve it?"; making all changes and improvements needed; then having the brief proofread and filed.

In a large law firm where a senior partner has junior partners or associates who can be assigned to do this work, perhaps fifteen days is a reasonable amount of time for all this to occur. Never having worked in a large law firm, I don't know. But for a small firm or sole practitioner, who are most of the lawyers in South Dakota, fifteen days is too few.

I have spent my career as a sole practitioner or in a small firm. Between the South Dakota Supreme Court and federal appellate courts (mainly the Eighth Circuit), I estimate I've written 50 to 60 reply briefs. It is always a struggle to comply with this Court's fifteen-day time limit. The other demands of practice (depositions, motions, telephone calls, e-mail, office administration, client conferences, other briefs, etc.) don't stop, and limit my ability to set aside the blocks of time needed to prepare the best possible reply brief. Some of these demands can be postponed; others can't be.

Perhaps 20 years ago I heard Justice John Konenkamp give the Pennington County Bar suggestions about practicing in the Supreme Court. He told us always to file a reply brief. He said that his reaction

to an initial brief was often "Sounds pretty good," and his reaction to a response brief was often "Sounds pretty good." He said he then looked to the reply brief.

A good lawyer writes the best reply brief possible. The ultimate winner is this Court, and its administration of justice, which benefits from high-quality legal work. Extending the time limit for a reply brief to thirty days would make it much easier for a lawyer to provide this Court with high-quality legal work.

(3) An analysis of the state or federal rule or statute that the change is based upon, if any.

The proposed change is based on SDCL 15-26A-75. The proposed change seems sufficiently straightforward that I don't know what additional analysis I could provide.

(4) A comparison of the change with federal rules or local federal rules on the same subject, if any, and an explanation of any differences, if any.

Federal Rule of Appellate Procedure 31(a)(1) provides a twenty-one day time limit for a reply brief, and provides that a reply brief must be filed at least seven days before argument. I have never had a

case in which the "seven days before argument" provision applied, because federal courts of appeal do not ordinarily set oral argument so close to the due date for the reply brief.

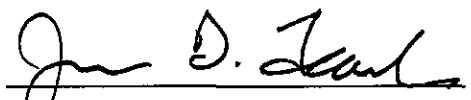
United States Supreme Court Rule 25.3 provides thirty days for filing a reply brief.

(5) An analysis of how the change affects existing rules or statutes.

The change would extend the time for filing a reply brief from fifteen to thirty days.

Dated: March 27, 2019

Respectfully submitted,



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WF WOODS FULLER®
SHULTZ & SMITH P.C.

#3

January 18, 2019

Bradley C. Grossenburg
Brad.Grossenburg@woodsfuller.com
Extension 675

SUPREME COURT

JAN 22 2019

RECEIVED

Ms. Shirley Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol Avenue
Pierre, SD 57501

Re: Rule Modifications

Dear Ms. Jameson-Fergel:

On behalf of the South Dakota Governor's Trust Task Force Committee, we would like to have the Supreme Court consider a modification to SDCL § 19-19-502. I am enclosing a copy of our suggested changes. I had a previous conversation with Chief Justice Gilbertson regarding this matter. I am also enclosing a copy of a brief article outlining some of the issues relative to the attorney-client privilege modifications.

On behalf of the South Dakota Governor's Trust Task Force Committee, if the Supreme Court would consider this modification, we would appreciate it. If they need further clarification, please let me know.

Very truly yours,

WOODS, FULLER, SHULTZ & SMITH P.C.

Bradley C. Grossenburg

Enclosures

cc: Chief Justice David E. Gilbertson w/enc.

#3

SDCL § 19-19-502 Lawyer-client privilege

(a) **Definitions.** As used in this section:

(1) A "client" is a person, a fiduciary of a trust or estate, public officer, or corporation, limited liability company, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him;

No explanation at this time. To be forwarded.

claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of a duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) Documents attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) Joint clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

Explanation for Proposal

The proposal was made by the South Dakota Governor's Trust Task Force Committee. The proposal would extend the lawyer-client privilege to a lawyer and the fiduciary of a trust or estate. The purpose for this amendment is to protect confidential communications between the fiduciary of a trust or estate and their lawyer. The amendment would protect the integrity of the lawyer-fiduciary relationship. The amendment would also clarify that communications between a fiduciary and their lawyer are privileged, except those communications specified in SDCL 19-19-502(d). The amendment is not based on any state or federal rule or statute.

Any person interested may appear at the hearing and be hear, provided that all objections or proposed amendments shall be reduced to writing and the original and ten copies thereof filed with the Clerk of the Supreme Court no later than _____.

Subsequent to the hearing, the Court may reject or adopt the proposed amendments or adoptions or any rule germane to the subject thereof.

#3

JEFFREY M. LOEB
Partner

10100 Santa Monica Blvd.
Suite 2200
Los Angeles, CA 90067

Direct 310.282.2266
Main 310.282.2000
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jloeb@loeb.com

MEMORANDUM

Via E-mail

Date: June 22, 2018

File: 66666-6666

To: Trust Counsel

From: Jeffrey M. Loeb

Re: Morgan v. Superior Court

Subject: Potential Joint Representation

In *Morgan* v. *Superior Court*, a decision rendered on May 29, 2018 by Fourth Appellate District of the California Court of Appeal, the Court found that a provision in the trust instrument protecting attorney-client communications between the trustee and its counsel against compulsory disclosure to a successor trustee was unenforceable based on public policy.

The *Morgan* court relied on the following: (a) California Probate Code Section 16461(b) provides that any trust provision which exculpates a trustee from a "breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiary" is void as against public policy, and (b) *Moeller* v. *Superior Court*, in which the California Supreme Court ruled that a successor trustee was entitled to privileged attorney-client communications between the former trustee and its legal counsel. Strangely, the Court concluded that any trust provision which would "prevent a successor trustee from obtaining the documents by which they might establish [the former trustee's] malfeasance, bad faith, or intentional misconduct," e.g., privileged attorney-client communications, "violates public policy, as expressed by statute, and is therefore void."

As far back as 1997, when *Moeller* was decided, estate planners began including in trust instruments the same type of protective language which appeared in the trust in *Morgan*. The authority for doing so was the *Moeller* decision itself. The question in *Moeller* was whether a trust provision that conferred upon a successor trustee all of the powers held by a predecessor trustee also conferred upon the successor trustee the power to assert (or not assert) the attorney-client communication privilege held by the former trustee. Although the *Moeller* court ruled that the successor trustee succeeded to the power to assert (or not assert) the attorney-client privilege, the Court also stated that "a trust instrument may limit a trustee's statutory powers." The Supreme Court had cited a comment in the Restatement Second of Trusts which read: "The powers conferred upon a trustee can properly be exercised by his successors, unless it is otherwise provided by the terms of the trust." The *Morgan* court, after noting that the former trustee had referenced that same comment, countered by citing a comment in the Third Restatement of Trusts to the effect that a trust provision which exculpates a trustee from liability for "a breach of trust committed in bad faith or with indifference to the fiduciary duties of the trustee . . . " is unenforceable.

The logic of the *Morgan* decision appears to be that because by statute a trustee cannot be exculpated in a trust instrument from certain wrongful actions, a successor trustee cannot be prevented by the trust instrument from obtaining privileged communications between a former trustee and its legal counsel in an attempt to prove that the former trustee's acts amounted to one of the wrongful actions for which the statute precludes exculpation. The *Morgan* court did not address the question of what would happen if the privileged communications revealed no wrongful acts were committed by the former trustee or that any wrongful acts which were committed fell within the scope of a statutorily approved exculpation provision. The attorney-client communications would have been disclosed and would thus no longer be privileged. A judicially-compelled waiver of the attorney-client communication privilege and the refusal to give effect to a settlor's expressed intention to preserve that privilege in all instances are the only results which should be viewed as a violation of public policy.

Our goal is to represent all of the major corporate trustees in California in filing an amicus curiae letter with the California Supreme Court in support of the *Morgan* appellant's petition for review, and in filing a request that the *Morgan* opinion be depublished, thus losing its precedential effect. In addition, if the California Supreme Court grants review, we then would seek leave to file, and if granted file, an amicus curiae brief in support of the *Morgan* appellant. Without this relief, corporate trustees will be faced with having to retain separate legal counsel paid for with its own funds in order for the attorney-client communication privilege to apply.

Trustees will likely need to begin charging each trust it administers a separate "legal counsel fee" to cover this expense. Whether the courts would find that doing so complies with the requirement that a trustee must bear the fee personally is, as yet, an unresolved issue. Very few settlors will be able to have their desired individuals or corporate trustees administer their trusts if a trustee is required to bear personally the expense of legal counsel to ensure the application of the attorney-client communication privilege.

We propose that our fee be divided equally among all of the corporate trustees who agree to the representation. We have inquired of the following corporate trustees, listed in alphabetically order: Bank of America/US Trust, Bank of the West, Bessemer Trust, BNY Mellon, Citibank, City National Bank, JP Morgan, Northern Trust, Union Bank, Wells Fargo Bank, and Whittier Trust.

Our timing is as follows: The Court of Appeal's decision will become final as to that court 30 days after issuance on May 29, 2018 – *i.e.*, on June 28, 2018. That date is the starting point for determining our timing both to seek depublication and to file a letter in support of review. Specifically, a request to depublish must be filed within 30 days after June 28, 2018 -- *i.e.*, on or before July 27, 2018. (Because the 30th day falls on Saturday, July 28, 2018, the deadline might be extended to Monday, July 30, 2018. To be safe, however, we would plan to file on or before Friday, July 27, 2018.) In turn, the *Morgan* appellant must file its petition for review within 10 days after June 28, 2018. Applicable court rules do not set a time within which a letter supporting a petition for review must be filed. However, the California Supreme Court ordinarily must act on such a petition within 60 days after it is filed. We therefore should file our letter in support of review as soon as possible after the petition for review is filed to make sure the court considers it in determining whether to grant review. Finally, if review is granted, we would be required to file our amicus curiae brief within 30 days after the last brief is filed by the parties.

WOODS FULLER®
SHULTZ & SMITH P.C.

#3

January 23, 2019

Bradley C. Grossenburg
Brad.Grossenburg@woodsfuller.com
Extension 675

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
JAN 28 2019
Clerk

Chief Justice David E. Gilbertson
South Dakota Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070

Re: Rule Modification to SDCL § 19-19-502

Dear Chief Justice Gilbertson:

Thank you for the telephone call today. As a follow-up to our telephone call, enclosed is a copy of the South Carolina statute I was referring to.

If you have any questions, please feel free to contact me. Thank you.

Very truly yours,

WOODS, FULLER, SHULTZ & SMITH P.C.

Bradley C. Grossenburg

Enclosure

#3 South Carolina

SECTION 62-1-109. Duties and obligations of lawyer arising out of relationship between lawyer and person serving as a fiduciary.

Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. This section is intended to be declaratory of the common law and governs relationships in existence between lawyers and persons serving as fiduciaries as well as such relationships hereafter created.

HISTORY: 1994 Act No. 449, Section 2; 2013 Act No. 100, Section 1, eff January 1, 2014.

SECTION 62-1-110. Fiduciary-lawyer privilege.

Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary.

HISTORY: 2008 Act No. 211, Section 1, eff May 13, 2008; 2013 Act No. 100, Section 1, eff January 1, 2014.

Jameson-Fergel, Shirley

#4

From: Sattizahn, Greg
Sent: Monday, July 22, 2019 2:37 PM
To: Jameson-Fergel, Shirley
Cc: Gilbertson, Chief Justice David
Subject: Weapons Capitol Proposed Rule
Attachments: Weapons.Capitol.ProposedRule.FINAL.docx

Shirley,

Here is that rule that is intended for the August rules hearing. As you may recall we also discussed sharing this broadly to get as much feedback as possible. I would suggest after you have this in the final notice form we share it with Jason Hancock and Tom Hart and ask them to share it within their branches as well. I am happy to do that if you would prefer it come from me. Thank you,

Greg

#4

2019 Proposed Court Rule

A proposed rule concerning the carrying of a concealed pistol in the state capitol areas under the authority of the Supreme Court.

Section 1. That a new rule be added to SDCL ch. 22-14 as follows:

For purposes of SDCL 22-14-24(5), the Supreme Court chamber in the state capitol building shall include the courtroom, the offices of the justices, the clerk of courts office, law library and the non-public areas of the Supreme Court's administrative and legal staff offices. The public area of the state court administrator's office is not included as part of the Supreme Court chamber.

Section 2. No firearms are permitted in any of the areas included in the Supreme Court chamber as defined in Section 1.

Section 3. Public notice of these provisions shall be posted conspicuously at each public entrance to an area included in the Supreme Court chamber as defined in Section 1.

Section 4. The Chief Justice may waive the application of this rule upon petition of an interested person for good cause shown.

Section 5. This rule is adopted pursuant to SDCL 22-14-25 and shall be effective immediately.

Explanation for Proposal

This rule is proposed in response to the legislative changes made during the 2019 session in SB 115 authorizing certain persons to carry concealed pistols in the state capitol building. The rule defines "chamber" of the Supreme Court to include the courtroom, justice's offices, clerk of courts office, law library and those non-public administrative areas where the justices work and confer with their staff. The restriction does not apply to the public office of the state court

administrator for those that comply with the provisions of SDCL 22-14-24(5). The intent is to clarify that the only area under the authority of the Supreme Court in the state capitol building where a member of the public may carry a concealed pistol under the new provisions is the office of the state court administrator.

22-14-24. Exceptions to penalty for possession in a county courthouse or state capitol. The provisions of § 22-14-23 do not apply to:

(1) The lawful performance of official duties by an officer, agent, or employee of the United States, the state, political subdivision thereof, or a municipality, who is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of law or who is an officer of the court;

(2) The possession of a firearm or other dangerous weapon by a judge or magistrate;

(3) The possession of a firearm or other dangerous weapon by a federal or state official or by a member of the armed services, if such possession is authorized by law;

(4) The possession of a concealed pistol in the state capitol by a qualified law enforcement officer or a qualified retired law enforcement officer in accordance with the Law Enforcement Officers Safety Act of 2004, 18 U.S.C. § 926B-C;

(5) The possession of a concealed pistol anywhere in the state capitol, other than in the Supreme Court chamber or other access-controlled private office under the supervision of security personnel, by any person not otherwise referenced in this section, provided:

(a) The person possessing the concealed pistol holds an enhanced permit issued in accordance with § 23-7-53;

(b) At least twenty-four hours prior to initially entering the state capitol with a concealed pistol, the person notifies the superintendent of the Division of Highway Patrol, orally or in writing, that the person intends to possess a concealed pistol in the state capitol;

(c) The notification required by this subdivision includes the date on which or the range of dates during which the person intends to possess a concealed pistol in the state capitol, provided the range of dates may not exceed thirty consecutive days; and

(d) The notification required by the subdivision may be renewed, as necessary and without limit; and

(6) The lawful carrying of a firearm or other dangerous weapon in a county courthouse incident to a hunter safety or a gun safety course or for any other lawful purposes.

Supreme Court Notice of Special Rules Hearing No. 140 - Legislative Responses

#4

From: Representative Carl Perry
Sent: Friday, August 2, 2019 8:56 PM
Subject: Supreme Court Notice of Special Rules Hearing No. 140 attached

Legislative Research Council Deputy Director Sue Cichos &
Legislative Research Council Director Jason Hancock

I am not an expert on special hearings. You asked if we had comments we would like to submit to the Supreme Court

Here are my thoughts on SDCL 15-6-45(b) and the special hearing by the Supreme of South Dakota. I believe Chief Justice David Gilbertson to be an awesome leader of our judicial system.

When I get nine pages on a subject that the Legislature has already worked on, I become concerned. We should be working to reduce regulation and regulators. The role of the legislature is to create laws we all can use.

Simply why are we undoing what we just accomplished?

Carl Perry
House of Representatives District 3
2722 Railroad Circle, Aberdeen, SD 57401
Home: 605-262-0113
cperry91@abe.midco.net

#4

From: Representative Kevin Jensen [mailto:kevinj605@gmail.com]
Sent: Monday, August 5, 2019 5:26 AM
Subject: Response to request for comments on Rule change

To Sue Cichos and Jason Hancock,

Simply put, my primary reason for co-sponsoring and supporting SB115 was NOT so legislators could carry guns, in fact I hope most of them do not. I believe that previous law denied the right of self defense to the state employees that work in the building. Is the court afraid of its own employees? I would hope not. If they are afraid of angry citizens, this rule change request puts the employees at further risk and does nothing to stop an attack. I believe any location that denies a resident the right of self defense should be liable for their security, including any state office.

Believing this rule will keep a mentally deranged person out of their workspace is typical gun-free-zone thinking that, as we see time and again, simply does not work. This rule change would also restrict normal access of legislators who carry to the law library and access to court officials and employees for consultation. Unless we are going to provide secure lockers for legislators and other building employees to store their defense pistols while they enter these gun-free-zones in the building, we are restricting their ability to defend themselves in their work environment, which is counter to the intent of SB115.

The court should not make law, they should interpret and apply it. The process of rules promulgation is too often abused. I am urging committee members to resist allowing the implementation of this rule.

Thank you,
Representative Kevin D. Jensen, District 16
Canton, SD 57013

From: Representative Tom Pischke [mailto:tompischke@hotmail.com] #4
Sent: Thursday, August 8, 2019 2:19 PM
Subject: SB 115

To Sue Cichos and Jason Hancock,

I believe that previous law denied the right of self defense to the state employees that work in the capital building.

Is the court afraid of its own employees? I would hope not. If they are afraid of angry citizens, this rule change request

puts the employees at further risk and does nothing to stop an attack. I believe any location that denies a resident the right of

self defense should be liable for their security, including any state office.

Believing this rule will keep a mentally deranged person out of their work space is typical gun-free-zone thinking that,

as we see time and again, simply does not work. This rule change would also restrict normal access of legislators who carry

to the law library and access to court officials and employees for consultation. Unless we are going to provide secure lockers for

legislators and other building employees to store their defense pistols while they enter these gun-free-zones in the building, we are

restricting their ability to defend themselves in their work environment, which is counter to the intent of SB 115.

The court should not make law, they should interpret and apply it. The process of rules promulgation is too often abused.

I am urging committee members to resist allowing the implementation of this rule.

Thank you,

Rep. Tom Pischke, District 25

August 25, 2019

To the Most Honorable David Gilbertson, Chief Justice,

Tomorrow morning you will be holding a hearing to consider promulgation of rules of the bill SB115, which was passed into law by the legislature and signed into law by Governor Noem, to now not allow people to carry in the offices and the law library of the South Dakota Supreme Court.

When I first thought about a bill like this several years ago, my main concern was for the safety and personal protection of legislators. But as I had conversations with Constitutional Officers and their employees who have offices in the SD Capital, I realized how vitally important it was that everyone who works in the Capital would be able to protect themselves from someone who might come into the Capital with the intent to commit a violent crime causing bodily injury or death. I applaud the Highway Patrol for the protection they provide for the Legislators, the employees and visitors in the Capitol, but they cannot be everywhere in this huge building at all times.

I encourage you and all Supreme Court judges to allow the law that is in place to remain in place as it stands with no promulgation of rules to exempt the offices of the Supreme Court and the Law Library. Those who work or visit the Supreme Court offices and the library should also have the right to defend themselves with a concealed weapon if they so desire under the constraints of this new law.

Thank you for your thoughtful consideration in upholding this new law.

Sincerely,

Representative Lee Qualm, House Majority Leader

Prime Sponsor of SB115